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**U.S. Citizenship  
and Immigration  
Services**


B5

Office: TEXAS SERVICE CENTER

IN RE:

ON BEHALF OF PETITIONER:

Thank you,



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**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a health care facility. It seeks to employ the beneficiary permanently in the United States as a neurosurgeon. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

As set forth in the director's March 31, 2010 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The "priority date" is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. 8 C.F.R. § 204.5(d).

In this matter, the priority date is April 27, 2009, the day the DOL accepted the ETA Form 9089 for processing. The DOL certified the ETA Form 9089 on February 10, 2010. The petitioner filed the Form I-140 on February 26, 2010. The director denied the petition on March 31, 2010, and the petitioner filed an appeal on April 29, 2010. It appears that the petitioner sought an automatic extension to file its 2009 tax return. Consequently, the record of proceeding does not contain any tax returns, audited financial statements, or annual reports pertaining to 2009 or to any time period thereafter because it is more likely than not that such evidence was unavailable at the time the director adjudicated the petition. The director based his denial on evidence predating the priority date which does not comply with 8 C.F.R. § 204.5(g)(2).

Therefore, the AAO will withdraw the decision and remand the case to the director to request and consider evidence of the petitioner's ability to pay the proffered wage, such as federal tax returns, audited financial statements, or annual reports from 2009, 2010, and 2011. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director of for issuance of a new, detailed decision.